ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	MM Docket No. 94-10
	)	
The Lutheran Church-Missouri Synod	)	File Nos. BR-890929VC
	)	BRH-890929VB
For Renewal of Licenses	)	
of Stations KFUO/KFUO-FM	)	
Clayton, Missouri	)	

To: The Review Board

REPLY TO EXCEPTIONS

THE LUTHERAN CHURCH-MISSOURI SYNOD

Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Scott R. Flick

Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 659-3494

Dated: December 6, 1995

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	MM Docket No. 94-10
	)	
The Lutheran Church-Missouri Synod	)	File Nos. BR-890929VC
	)	BRH-890929VB
For Renewal of Licenses	)	
of Stations KFUO/KFUO-FM	)	
Clayton, Missouri	)	

To: The Review Board

REPLY TO EXCEPTIONS

DOCKET FILE COPY ORIGINAL

THE LUTHERAN CHURCH-MISSOURI SYNOD

Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Scott R. Flick

Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 659-3494

Dated: December 6, 1995

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, Statutes and Regulations

SUMMARY

The Review Board should deny the NAACP's Exceptions to the ID. The Exceptions are inaccurate, misleading, unsupported by record evidence or case precedent, and riddled with gross hyperbole and unwarranted and inappropriate rhetoric.

The NAACP offers no valid reasons for rejecting the Judge's finding that KFUO(AM) and KFUO-FM did not discriminate on the basis of race during the License Term. The Judge correctly found that the Church's legal argument in pleadings as to the appropriate labor-pool for evaluating its EEO efforts was not some sort of "indicator" that the Church was a discriminator. The argument about labor-pools was made at the suggestion of the Church's then counsel, Arnold & Porter, and was based on an argument that Arnold & Porter had made for a different client in another case. The Judge also correctly found that the Stations reasonably relied on an outside consultant who had advised that classical music experience was a valuable job qualification for salespersons. There was no evidence whatsoever that this criterion was ever used to turn away a minority applicant or as a pretext for discrimination. Moreover, the allegation that the Church was a discriminator had not even been designated by the Commission in the HDO.

The NAACP is wrong to argue that the Church should be stripped of its licenses because it preferred to hire individuals with knowledge of Lutheran doctrine for certain positions which the Judge did not believe were "reasonably connected" with the espousal of the Church's religious views. This argument is based on the decision in King's Garden v. FCC, 498 F.2d 51 (D.C.Cir.) cert. denied,, 419 U.S. 996 (1974), a case that is no longer good law after the Court's decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). Moreover, the Commission has never done anything to clarify the requirements of King's Garden to particular positions in the 20 years since that decision, in spite of repeated requests

that it provide guidance. It would be patently unfair to impose any sanction on the Church where there has been a lack of Commission guidance and resulting uncertainty, even assuming arguendo that King's Garden were still good law.

The NAACP also fails to support its outlandish claim that the Church "committed material misrepresentations of elephantine weight and rabbitlike numerosity." The only specific exceptions that the NAACP raises involved matters that were considered during the hearing. The allegations that these matters constituted misrepresentations has no merit. The Review Board should not consider purported misrepresentations about which the NAACP has not lodged specific exceptions. In any case, virtually none of these alleged misrepresentations were designated in the HDO and were not even raised until the NAACP filed its proposed findings. They cannot be used as a basis for an adverse finding in this proceeding because the Church had no notice or opportunity to introduce evidence rebuttting these allegations.

Lacking arguments to support its views on the merits, the NAACP complains about various of the Judge's procedural rulings on a motion to enlarge issues, discovery matters and the rejection of certain NAACP exhibits. The Judge was correct to reject for a host of reasons the NAACP's bizarre contention that the Church had "stolen its work product." His procedural rulings on evidentiary matters were appropriate exercises of his duty to move the case forward in an orderly fashion with due regard for equity and fairness.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	MM Docket No. 94-10
	)	
The Lutheran Church-Missouri Synod	)	File Nos. BR-890929VC
	)	BRH-890929VB
For Renewal of Licenses	)	
of Stations KFUO/KFUO-FM	)	
Clayton, Missouri	)	

To: The Review Board

REPLY TO EXCEPTIONS

The Lutheran Church-Missouri Synod (the "Church"), by its attorneys and pursuant to Section 1.277 of the Commission's rules, hereby submits its Reply to the Exceptions[1/] filed November 1, 1995 by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (the "NAACP").[2/]

1/ In this Reply, the Church has focused on the major arguments advanced in the NAACP's Exceptions. Silence in this Reply on a particular point in the NAACP's Exceptions should not be considered a concession on the part of the Church. Rather, the Church submits that its Proposed Findings and Conclusions and its Exceptions accurately depict the record evidence and the pertinent case precedent.

2/ The NAACP's Exceptions contain lengthy footnotes and indented material which fail to comply with Section 1.49 of the Commission's rules. That rule specifically states that "[f]ootnotes and indented quotations must be in type that is 12-point or larger in height, with at least 1/16 of an inch (0.158 cm.) between each line of text. Counsel are cautioned against employing extended single spaced passages or excessive footnotes to evade prescribed pleading lengths." Because the NAACP has clearly designed its footnotes and indented material as a means to evade the 25 page limit, in violation of the Review Board's Letter Order in this proceeding released October 11, 1995 (Reference # 1170), the appropriate remedy, at a minimum, would be to strike the NAACP's footnotes and indented material.

I. PRELIMINARY STATEMENT

1. At the outset, the Church finds it unfortunate and regrettable that a nationally recognized organization of the stature of the NAACP would so vehemently attack a mainstream religious institution that has 2.6 million members, including 50,000 African American members, 86 African American pastors, and 30 African American faculty and administrative members of its colleges and seminaries. As reflected in the Initial Decision ("ID") in this proceeding, FCC 95D-11, released September 15, 1995, the Church has a longstanding commitment to nondiscrimination and affirmative action. The NAACP's action is inappropriately divisive at a time in this country when there is a critical need for unity. Curiously, as almost an afterthought in its Exceptions, the NAACP claims that its action is not intended as an attack on the Lutheran Church itself. If this is an attempt at an apology, it flies in the face of the earlier accusations leveled at the Lutheran Church as for example "fraudulent," a "liar" and a maker of "racist" statements, throughout the NAACP's Exceptions. (See, e.g., NAACP Exceptions, at pp. 7, 12, 21, 22 and 24).[3/]

2. The NAACP's Exceptions are inaccurate, misleading, unsupported by record evidence or case precedent, and riddled with gross hyperbole and unwarranted and inappropriate invective. Moreover, the NAACP is unclear as to the nature of the relief it seeks. At some points, it appears that the NAACP would like to start this case all over again. Contending that "the trial record is beyond repair," the NAACP requests the Board "to overrule the ID," yet fails to state what it hopes to accomplish by this action. Does the NAACP expect the Commission to spend its resources retrying an entire case in which an Administrative Law Judge has already heard and

---

[3/] The NAACP alleges for the first time in its Exceptions that the Church had a "rogue subsidiary." To the contrary, in the Church's view, KFUO(AM) and KFUO-FM have always been "dedicated to the task of carrying out in their way the Great Commission which Christ gave the Church, to preach the Gospel to every creature and to nurture and serve people in a variety of ways." ID ¶ 8.

considered substantial evidence? Significantly, the FCC staff is not seeking such relief. It has not filed Exceptions to the ID. At other points, the NAACP asserts -- erroneously -- that "an ALJ cannot overrule a Hearing Designation Order." (Exceptions, at 7). But, under that theory retrying this case would be a useless exercise. The NAACP would apparently have the Commission deny the Church's licenses on the basis of its own allegations in the Hearing Designation Order and Notice of Opportunity for Hearing of Forfeiture, 9 FCC Rcd 914 (1994) (the "HDO"), without a hearing to determine whether those allegations are true. It is difficult to imagine, however, a more grave violation of well established principles of administrative law and the Communications Act of 1934, as amended. In any case, whatever relief the NAACP is seeking, none of the arguments it advances has any merit and its Exceptions must be denied.

II. ARGUMENT

A. THE JUDGE CORRECTLY FOUND THAT THE CHURCH'S STATIONS DID NOT DISCRIMINATE ON GROUNDS OF RACE

3. Contrary to the NAACP's contention, the Judge correctly found that the Church's stations, KFUO(AM) and KFUO-FM (the "Stations" or "KFUO") did not discriminate on the basis of race during the License Term. ID ¶¶ 42-49, 194-196; see also ID ¶¶ 36-41. As the Judge stated: "[N]o individual was discriminated against by the Stations because of race. . . . There is not one scintilla of evidence in the record to indicate any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices." ID ¶ 194.

4. Indeed, it is unfortunate that the Church was subjected to a lengthy inquiry into an area that was not even the subject of the HDO. The HDO, as framed by the full Commission, contained 12 single-spaced pages of discussion leading up to the designation of an issue as to whether

the Church's Stations had complied with the affirmative action provisions contained in § 73.2080(b), not the nondiscrimination provisions in § 73.2080(a). The NAACP did not and could not point to any argument that the Commission had failed to consider in framing the issue in this manner in the HDO, and the Judge should therefore not have expanded the scope of the hearing,[4/] over the opposition of the Mass Media Bureau as well as the Church, to include an issue as to whether the Stations complied with the nondiscrimination provisions in § 73.2080(a). Atlantic Broadcasting Company (WUST), 5 F.C.C. 2d 717, 721 (1966); see also Fidelity Radio, Inc., 1 F.C.C. 2d 661, 662 (1965). The NAACP now seeks to compound that error by urging a finding of discrimination where the evidence does not support such a finding and where the ALJ himself found no discrimination.

5. The NAACP's primary contentions seem to be that the Judge erred by (1) refusing to convert the hearing into an open-ended proceeding under Title VII concerning all the Stations' employment practices; and (2) refusing to accept the purported "finding" in the HDO that the Church made an "inherently discriminatory" legal argument in pleadings when it asserted that in order to evaluate the Church's EEO efforts, one way to measure the labor-pool for salespeople for KFUO-FM was to look to those with an interest in classical music. Neither of the NAACP's contentions has any merit.

6. Contrary to the NAACP's suggestion, this "license renewal proceeding is not a Title VII suit." Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). The FCC is not empowered with an "undifferentiated mandate to enforce the antidiscrimination laws" and can only analyze licensees' employment practices to the extent that they affect issues under the Communications Act. Id. (citing NAACP v. FPC, 425 U.S. 662, 669 (1976) (Congress centralized responsibility for enforcement of Title VII in the EEOC, and did not give agencies such as

---

4/ See Memorandum Opinion and Order, FCC-191, MM Docket No. 94-10 (released March 25, 1994) (modifying issue in this case).

the FCC open-ended directives to eradicate discrimination)). The Judge therefore did not err in refusing to consider NAACP allegations that were not designated in the HDO[5/] and in not attempting to "match federal EEO trial standards" under Title VII.[6/] (NAACP Exceptions, at ¶ 8).

7. The NAACP is also wrong when it contends that the Judge "overruled a finding" in the HDO that it was an "indicator" of discriminatory intent that the Church had argued in pleadings that one way to define the appropriate labor-pool for evaluating its EEO efforts was to look to those individuals who had showed an interest in classical music. The Commission has always made it clear that an HDO does not constitute "findings," but merely contains unproved allegations. Cleveland Television Corp. v. FCC, 732 F.2d 962, 973 n.13 (D.C.Cir. 1984); see Black Television Workshop of Los Angeles, Inc., 4 FCC Rcd 3871, at ¶¶ 14-15 (1989). The case cited by the NAACP, Atlantic Broadcasting Co. (WUST), 5 F.C.C. 2d 717, relates to the Review Board's power to add issues and to the standards for such additions, and in no sense lends support to the NAACP's attempt to convert the HDO, through some sort of alchemy, into a set of "findings" that could not be questioned by the Judge. The Judge's task was to hear probative evidence and then to determine whether

---

5/ As noted in paragraph 4 above, the Judge's mistake was to expand the HDO to include the unfounded issue of discrimination.

6/ The Church is in any case confused by the NAACP's contention that this proceeding should "match" Title VII standards. (NAACP Exceptions, at ¶ 8). If this were a Title VII case, the burden of proof would be placed on the person alleging discrimination. See, e.g., St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748-50 (1993). By contrast, the HDO placed the burden of persuasion on the Church -- the Church was unfairly required to prove that it did not engage in any wrongdoing (HDO, 9 FCC Rcd at 926) -- and the NAACP apparently believes that the burden was appropriately allocated. (NAACP's Exceptions, at ¶ 17). More important, if this were a Title VII case, then it would be beyond dispute that the 1972 amendment to that act exempting religious organizations from the ban on religious discrimination would apply. Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a). Yet, the NAACP apparently wants the Commission to conclude that the Church discriminated on grounds of religion and should lose its license as a result. (NAACP's Exceptions, at ¶ 47). The Church is unable to discern a plausible explanation for the NAACP's apparent inconsistencies about whether Title VII applies to this case.

there was any merit to the allegation that the Church's legal argument about the appropriate labor-pool somehow proved that the Church was a discriminator. And he correctly found that the argument did not describe the Stations' hiring practices and said nothing about their willingness to hire minorities, for the reasons stated in paragraphs 136-141, 149, 153-157 and 197-198 of the ID. The Judge correctly found that:

> [T]he record establishes that the Church was advised by Peter J. Cleary, the founder of [Concert Music Broadcast Sales] and the Stations' outside consultant, that classical music experience was a valuable job qualification for salespersons. Mr. Cleary's rationale for his view was completely reasonable and logical, and is fully credited. In addition, there was no evidence that any minority applicant was turned away or discouraged from applying for a job at KFUO-FM because of a lack of classical music expertise. It does not, therefore, appear that the criterion was ever used as a pretext for discrimination.

ID ¶ 197. The NAACP does not and cannot contest these findings, including credibility findings, by the trier-of-fact. It should be noted that, as the Church explained in full in its Exceptions, the argument about the appropriate labor-pool with which the NAACP takes issue was made at the suggestion of its counsel, Arnold & Porter, and was based on an argument that Arnold & Porter had made for a different client in another case. See ID ¶¶ 155-157. Moreover, the Court of Appeals for the District of Columbia Circuit has recently rejected a similar contention by the NAACP that the advancement of a legal argument about the appropriate labor-pool for testing compliance with the EEO Rule was somehow tantamount to discrimination. Florida State Conference of NAACP v. FCC, 24 F.3d 271 (D.C.Cir. 1994) (affirming License Renewal Applications of Pasco Pinellas Broadcasting Co., 8 FCC Rcd 398 (1993)).

8. The NAACP's other claims of alleged errors in the ID have no more merit. For example, contrary to the NAACP's contention in paragraphs 22 and 23 of its Exceptions, the Judge was surely correct to find probative the Stations' employment of an African American in a Top Four

position until her death, the Church's consideration of another African American for promotion to a management-level position (who left the Stations voluntarily before she could be promoted), and the Church's decisions to hire one Hispanic and four African American employees during the course of the License Term. ID ¶¶ 75, 76, 84, 88, 196. As the Judge stated, "[i]f the Church had been bent on racial discrimination, it is highly unlikely that these African American or Hispanic individuals would have filled any position at the Stations." ID ¶ 196. The NAACP is also wrong to argue in paragraphs 24-25 of its Exceptions that the "statistical record" somehow proves that the Church was a discriminator. In fact, the Church substantially complied with the EEO Rule -- of its 43 full-time hires, 25 (58.1%) were female and 7 (16.3%) were minority. ID ¶ 68. Indeed, during the License Term, the Stations hired minorities at 104.5% of minority representation in the local workforce. (Church Proposed Findings, at ¶ 156).[7/] The Church's record was therefore far better than those cited in the cases in paragraph 256 of the ID, where the Commission found violations of the affirmative action requirements of the EEO Rule, and can certainly not be used as the basis for any inference of intentional discrimination.[8/] As for Mr. Lauher's efforts, the Judge was correct to characterize them as "laudable" attempts to ensure compliance with the Commission's affirmative action requirements. ID ¶ 217; see ID ¶¶ 119-121. The NAACP's slanderous characterizations of Mr. Lauher's efforts as "condescending" and "dishonest" do nothing to undermine the findings of the

---

7/ It should be noted that the NAACP has not excepted to the Judge's findings that the Stations complied with the Commission's affirmative action requirements for the first four and one-half years of the License Term, *i.e.*, from February 1, 1983 to August 3, 1987. ID ¶¶ 73-87, 205-212.

8/ The NAACP's allegations about purported events after the License Term in paragraph 26 and in Note 26 of its Exceptions cite to materials outside the record which are not relevant in this case. The Review Board should therefore disregard those unsubstantiated allegations.

Judge about the facts.[9/]

B. THE CHURCH SHOULD NOT BE PUNISHED BECAUSE OF ANY ALLEGED FAILURE TO ADHERE TO THE GUIDELINES OF KING'S GARDEN

9. The NAACP apparently believes that the Church should be stripped of the licenses for its 71-year old broadcast mission because its Stations preferred to hire individuals with knowledge of Lutheran doctrine for certain positions for which the Church believed it was appropriate, but which the Judge did not believe were "reasonably connected" with the espousal of the Church's religious views. (NAACP's Exceptions, at ¶¶ 47-48). For at least two reasons, the NAACP is wrong.

10. First, and most fundamental, the NAACP's argument is based on the 20 year-old decision in King's Garden v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden") which is no longer good law after the Court's decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). As explained in detail in the Church's Exceptions, the Court's reasoning in Amos makes it clear that any attempt by the Government to arrogate to itself the role of determining which particular job functions at the Stations were "properly" considered religious violates the Free Exercise Clause of the First Amendment to the Constitution, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1, and the federal policy adopted by Congress in promulgating an exemption for religious institutions from the requirements of Title VII of the Civil Rights Act of

---

9/ The NAACP argues that the Judge should have ignored facts about Reverend Devantier's demonstrated personal commitment to nondiscrimination (NAACP Exceptions, at Note 29) but then concocts a fictitious story about the personal lives of Church officials (e.g., that they send their children away from public schools (NAACP Exceptions, at Note 58)) that it wants to use instead. This is unfair, to say the least. The NAACP's fictitious story about the supposed knowledge and reactions of unidentified "Black professionals" in Note 17 of its Exceptions is not based in any way on record evidence and has no probative value.

1964, 42 U.S.C. § 2000e-1(a).

11. Second, even assuming arguendo that the Commission could still legally second-guess the Church's judgments about which job functions "properly" have religious qualifications, the appropriate remedy for the Stations' conduct would not be the loss of license proposed by the NAACP.[10/] In the King's Garden case itself, the remedy imposed by the Commission for the licensee's use of religious qualifications for all jobs was to direct the licensee to submit a "statement of its future hiring practices and policies." King's Garden v. FCC, 498 F.2d at 52. And since the decision in King's Garden -- continuing past the Court's decision in Amos -- the FCC has provided little, if any, guidance regarding the EEO programs of religious licensees. As long ago as 1973, religious broadcasters requested the Commission to issue specific guidelines for religious stations. National Religious Broadcasters, Inc., 43 F.C.C.2d 451 (1973) (letter seeking ruling as to applicability of King's Garden to various positions); see also King's Garden, Inc., 38 F.C.C.2d 339 (1972) (petition for rulemaking). The Commission deferred action on the National Religious Broadcasters' request, however, claiming that it preferred a case-by-case approach to developing standards for religious broadcasters. National Religious Broadcasters, 43 F.C.C.2d at 452. The Commission dismissed the earlier request for rule making by King's Garden as moot. (Letter from Chief, Broadcast Bureau to King's Garden, Inc. (October 5, 1976)). Now, twenty years later, having done nothing to clarify how the requirements of King's Garden apply to particular positions, the Commission should apply any standards it establishes prospectively only, and should not judge the Church's performance during the License Term under any newly-developed standards. See Greene v. United States, 376 U.S. 149, 160-161 (1964). It would be patently unfair to impose any sanction on the

---

10/ It should be noted that the Judge found no evidence that the Stations ever rejected a particular applicant on grounds of religion, and the NAACP has not excepted to that finding. The Judge correctly concluded that "no individual was discriminated against by the Stations because of race, color, religion, national origin or sex." ID ¶¶ 194, 200.

Church for its past conduct where there has been a lack of Commission guidance and resulting uncertainty.

C. THE CHURCH NEITHER MADE MISREPRESENTATIONS NOR LACKED CANDOR

12. As the Church emphasized in its Exceptions, there is no record evidence for the Judge's speculation in the ID that the Church had an intent to deceive the Commission, an "essential element" of a violation of the duty of candor. Fox Television Stations, Inc., 10 FCC Rcd 8452, at ¶ 60 (1995), (citing Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994)). For the same reason, the NAACP's charges that the Church made false statements of fact to the Commission have no merit -- the NAACP does not and cannot show that the Church had any intent to deceive, and such an intent is an essential element of any purported misrepresentation. Fox Television Stations, Inc., 10 FCC Rcd 8452, at ¶¶ 59-60. Indeed, the NAACP has not even alleged an intent to deceive by the Church in its vituperative Exceptions, much less cited to record evidence that would support such an allegation. For this reason alone, the Review Board should reject the NAACP's claim that the Church committed misrepresentations.

13. There are, however, many other reasons why the NAACP's arguments should be rejected. The Judge was correct to find that the principal allegation against the Church -- that it had misrepresented the number of hires at the Stations in the 1989 Renewals -- had no merit. ID ¶ 229; (see Church's Exceptions, at ¶ 6). Indeed, the NAACP does not even except to the Judge's finding that the Church did not lack candor in reporting the number of the Stations' hires and that any numerical error was merely a discrepancy based on a "simple oversight" resulting from two different questions asked by the Commission. ID ¶ 229.

14. The Judge was also correct to find that the Church had no reason to believe that its decades-old work/study program with the Concordia Seminary should have been discussed in the

Renewals; and the Judge therefore correctly rejected the suggestion in the HDO that the "silence" in the Renewals about Concordia constituted either a lack of candor or a misrepresentation. ID ¶¶ 23-35, 239-241. As the Judge found, the Church had told the Commission for decades that it had a close relationship with the Seminary. ID ¶ 23. The arrangement was the kind of training program whose propriety had never previously been questioned by the FCC, and the Church therefore had no reason to think that it needed to be discussed in the Renewals. ID ¶¶ 27-29, 240. See Southwest Texas Public Broadcasting Council, 85 F.C.C. 2d 713, 716 (1981) (holding that there was no reason that a broadcaster dependent on financial grants and contributions should have refused to accept free use of a university's broadcast facilities and personnel in return for providing the university's students with hands-on broadcast training). Moreover, the arrangement involved primarily part-time trainees, working only 6 to 12 hours a week, and the FCC Form 396 filing instructions did not request information on part-time workers. ID ¶¶ 34, 241. The NAACP's cryptic comment in note 32 of its Exceptions to the effect that other stations' work/study programs were secular and did not involve seminaries does nothing to undermine the Judge's findings that there was no lack of candor or misrepresentation.

15. In paragraph 32 of its Exceptions, the NAACP argues that "KFUO committed material misrepresentations of elephantine weight and rabbitlike numerosity." The only specific exceptions that the NAACP raises involved matters that were considered during the hearing. The NAACP's allegation that these matters constituted "misrepresentations" has no merit:

(a) The NAACP's Purported Misrepresentations ## 14-15 are attacks on a sentence in the Church's EEO recruitment program which states: "We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex." For all the reasons given in paragraph 22 of the Church's Exceptions, however, this sentence is true. The NAACP is simply wrong when it alleges that the Stations

did not deal with "secular employment services." The record demonstrates that the Church contacted Snelling & Snelling, Roth Young Personnel Service of St. Louis and Sales Recruiters Irvin-Edwards. ID ¶ 120.

(b) The NAACP's Purported Misrepresentation #21 is an attack on a statement in the Church's December 29, 1989 EEO Supplement (the "Church's Supplement") that KFUO had "initiated" a policy as of that date of advertising openings in the St. Louis Argus. But the statement in the Church's Supplement was true -- the only two openings subsequent to the Church's Supplement during the License Term were in fact advertised in the Argus. ID ¶ 130.

(c) In its Purported Misrepresentation # 22, the NAACP challenges a statement in the Church's Supplement reporting that a "data form" had been put into use at the station. But, the data form was indeed adopted for use four months prior to the Church's Supplement by virtue of a cover memorandum from then FM General Manager Thomas Lauher. See Church Ex. 4, Att. 13; cf. ID ¶ 116.

(d) The NAACP's Purported Misrepresentation #46 is, once again, an attack on a true statement. The statement in a pleading filed in February 1990 on the Church's behalf by its counsel, Arnold & Porter, was that KFUO had drawn on multiple referral sources throughout its License Term. The record shows that this was true. See, e.g., ID ¶¶ 73, 76, 79, 81-83, 88, 91, 120, 126, 130. It is irresponsible for the NAACP to claim -- without one shred of record evidence -- that the Church somehow "knew" that this was a lie.

(e) The NAACP's Purported Misrepresentations ## 55-57 all relate to statements in pleadings to the same effect -- that one of the reasons that the Stations used Concordia Seminary students for part-time work/study positions was that the Stations were housed rent-free on the Seminary campus. There is, however, nothing inaccurate, much less intentionally deceptive, about the Church's explanation for its use of Concordia students. As shown in the financial statements of

the Stations (Church Ex. 4, Att. 5), KFUO was treated as a separate entity for financial purposes. The financial statements show no rental payments to the Seminary, thereby allowing the Stations to show lower operating deficits during the License Term. Obviously, if the Stations had needed to rent studio space from a third party, the Stations would have been injured financially. The NAACP misses the mark when it argues that there was some sort of "misrepresentation" by attacking the legitimacy of the argument that the Stations were benefitted because they did not need to pay rent.

(f) In its Purported Misrepresentation # 67, the NAACP is wrong to argue that the Church deliberately lied when it stated that the Stations struggled financially during the early years of the License Term. Again, the Church's report of these financial difficulties was true, as the Judge found in the ID. See ID ¶ 73.

(g) Finally, the NAACP's Purported Misrepresentations ## 68 and 70 attack the veracity of the hearing testimony by Dennis Stortz concerning the "vigor" of the Stations' recruitment efforts during the last months of the License Term and the Stations' efforts to hire a minority salesperson in early 1988. The trier-of-fact found, however, that "Mr. Stortz testified truthfully at the hearing even when his testimony was likely to have had an adverse effect on the Church's case," (ID ¶ 259), and the NAACP does not and cannot show that this finding about Mr. Stortz's credibility at hearing is wrong. Moreover, the Judge found that the Stations did, in fact, make an effort to hire an African American or Hispanic salesperson in early 1988 (ID ¶ 88), and the NAACP has not provided the Review Board with any reason to question this finding.

16. Insofar as the NAACP is arguing about other purported misrepresentations of supposed "rabbitlike numerosity" (NAACP Exceptions, at ¶ 32), the NAACP has not lodged specific exceptions to any finding in the ID, and the NAACP's contention should therefore not be considered by the Review Board. For the sake of completeness, however, it should be noted that the Judge was certainly justified in refusing to consider many purported "misrepresentations" alleged by the NAACP

on the ground that they had not been designated in the HDO nor even raised until the filing of proposed findings. Thus, they could not possibly be used as the basis for an adverse determination in this proceeding -- the Church had no notice or opportunity to introduce evidence on these allegations. As the Judge stated in the ID, "[i]t is axiomatic that the purpose of a hearing designation order is to provide the licensee with notice of the misconduct alleged so that it may have an adequate opportunity to prepare a defense." ID at Note 23, (citing Faith Center,Inc., 82 F.C.C. 2d 1, 9 (1980), recon. denied, 86 F.C.C. 2d 891 (1981), aff'd per curiam, 679 F.2d 261 (1982)). "It would be manifestly unfair and a denial of due process to reach conclusions on matters about which the Church was given no prior notice." ID at Note 23 (citing Algreg Cellular Engineering, 9 FCC Rcd 5098, 5146 (Rev.Bd.) recon. denied, 9 FCC Rcd 6753 (1994), Garrett, Andrews & Letizia, Inc., 88 F.C.C. 2d 620, 625 (1981)).[11/]

17. In sum, the charges of Purported Misrepresentation made by the NAACP have no merit. The Review Board should summarily reject the NAACP's attempt to turn every statement by the Church with which it disagrees into some sort of "misrepresentation" -- even when the Judge made findings in the ID that the Church was candid about the matter in question or that the statements at issue were true.

11/ To be sure, as the NAACP notes, a judge might have the power to make a lack of candor finding without prior designation of an issue where the lack of candor occurs before the judge's own eyes at a hearing and/or is so blatant that any further evidentiary hearings would be "obviously superfluous." Silver Star Communications-Albany, Inc., 3 FCC Rcd 6342, at ¶ 29 (Rev. Bd. 1988), modified, 6 FCC Rcd 6905 (1991). But in this case, the Judge found that the Church's witnesses Dennis Stortz and Reverend Devantier were truthful at hearing. ID ¶ 259. Moreover, none of the NAACP's spurious allegations could even remotely meet the standard of showing a patent or egregious lack of candor that was so "blatant" as to make a hearing on them unnecessary.

D. THE PROCEDURAL RULINGS ABOUT WHICH THE NAACP COMPLAINS WERE CORRECT AND WELL WITHIN THE PRESIDING JUDGE'S DISCRETION

18. Lacking arguments to support its view that the Judge erred on the merits, the NAACP instead complains about various of the Judge's procedural rulings, and makes the outlandish claim that these rulings somehow made the result of the hearing a "foregone conclusion." (NAACP Exceptions, at ¶ 3). It is well established, however, that presiding officers have broad responsibility to manage hearings assigned to them. "It is their obligation to see that these proceedings move forward in an orderly fashion with due regard for equity and fairness to all participating parties." Chronicle Broadcasting Co., 20 F.C.C.2d 728, at ¶ 3 (Rev. Bd. 1969). Presiding judges also have the power to preclude any use, or particular uses of discovery procedures, on a finding that their use will not contribute to the proper conduct of the proceeding. See Discovery Procedures, 11 F.C.C. 2d 185 (1968). A Judge's ruling on an interlocutory motion or a discovery matter should not be overturned absent a showing that the Judge has acted in an arbitrary and capricious manner or has abused his discretion. Chronicle Broadcasting Co., 20 F.C.C. 2d 728, at ¶ 3 (Rev. Bd. 1969); WPIX, Inc, 23 F.C.C. 2d 786, at ¶ 3 (Rev. Bd. 1970). When the NAACP's Exceptions are evaluated pursuant to this standard, it is readily evident that the NAACP has not identified any errors in the Judge's rulings, let alone an abuse of discretion.[12/]

19. At pages 16-20 of its Exceptions, the NAACP appears to take issue with the Judge's ruling on a Motion to Enlarge Issues it filed on June 20, 1994. Although the Exceptions contain a rambling and inaccurate discourse about the subject of the motion to enlarge, the NAACP totally fails

---

12/ It also appears that the NAACP's arguments about the Judge's procedural rulings stem from its misplaced belief that an FCC hearing on EEO issues is the same as a federal Title VII trial. For the reasons set forth in paragraph 6, infra., this belief is entirely wrong.

to point to any error in the Judge's treatment of its allegations in paragraphs 262-272 of the ID , where he denied the motion.[13/]

20. The NAACP's motion to enlarge was in fact bizarre. It stemmed from an allegation by counsel for the NAACP that "his work product had been stolen." For dramatic effect, counsel made this absurd allegation at the commencement of the hearing after apparently arranging to have a reporter from the major St. Louis newspaper present in the courtroom. As the transcript of the hearing session fully reveals, counsel for the Mass Media Bureau, as well as counsel for the Church, vigorously protested the NAACP's allegations that any misconduct had occurred. (Tr. 73-76). In any event, despite the highly questionable merits of the allegations, the NAACP was given the opportunity to file a motion to enlarge issues. The ID fully dealt with the allegations presented. The Judge correctly concluded that the motion was not supported by "affidavits of a person or persons having personal knowledge" of the facts alleged as required by Commission rules, that the work product doctrine was not applicable, that there was no "conspiracy" to steal the NAACP's work product, that Mr. Lauher was independent of the Church and not under its control or direction, and that the allegations were rebutted during the testimony at hearing. ID ¶¶ 268-272. The NAACP has made no attempt to challenge the specific and complete findings and conclusions of the Judge. Accordingly, its arguments with respect to this matter must be rejected.

21. The NAACP further complains about the Judge's rulings on certain discovery matters. Specifically, it claims that "the Judge refused on relevance grounds to allow the production of documents written by KFUO managers about the stations' minority employees, or by the minority employees about their working environment at KFUO, or concerning rates of compensation." The

---

13/ The NAACP refers to Thomas Lauher, a former general manager of KFUO-FM, as the Church's "lead off and most critical witness." Mr. Lauher appeared first because he was a non-party witness and had scheduling conflicts the week of the hearing. The Church called him as its first witness simply to accommodate his schedule.

document production requests to which the NAACP refers are Requests 12, 17, 26 and 30. (NAACP Exceptions, at 4-5). The rejected requests were as follows:

> (12) For each person who ceased to be an employee of the Station during the license term, all personnel evaluations, memoranda concerning job performance, memoranda of layoff or termination, and the employee's responses to any of these documents.
>
> (17) Documents sufficient to manifest the rate of compensation, including benefits, paid to each employee during the license term.
>
> (26) All documents which were required to be filed or were filed with any local, state or federal agency relating or referring to race, color, sex, national origin, religion or age, except documents already on file with the Federal Communications Commission in this proceeding or in connection with the Commission's staff investigation which preceded this proceeding.
>
> (30) All documents relating or referring to any formal or informal internal grievances or complaints alleging discrimination on the basis of race, color, sex, religion, national origin or age in connection with the employment practices of Respondent, and the disposition of such grievances or complaints.

NAACP Initial Request for Production of Documents (filed March 16, 1995).

22. At the outset, it should be noted that the Mass Media Bureau filed a Request for Production of Documents on March 17, 1995 requesting broad categories of documents relevant to the designated issues. The Church did not oppose the Bureau's request and, in response, produced almost 4000 pages of documents. (See Church's Opposition to the NAACP's Further Motion to Compel Production of Documents (filed April 29, 1994)). The Church filed a Partial Opposition to the NAACP's Initial Request on March 30, 1994, in which it objected to the NAACP's Instructions as confusing and extremely burdensome and objected to some of the document requests. The Church also commented that many of the NAACP's requests were covered by the requests of the

Mass Media Bureau. In response to the specific requests discussed in the NAACP's Exceptions, the Church stated:

> Request 12 - This request is irrelevant to the issues in this proceeding which concern nondiscrimination, affirmative action and the number of employees hired over a given period. This case does not involve any question about the cessation or termination of employment.
>
> Request 17 - This request is irrelevant to the issues in this proceeding.
>
> Request 26 - This request is overly broad and confusing. It is also not limited to the license term.
>
> Request 30 - This request is not limited to the term and seeks information which is not relevant to the renewal application or the designated issues. There are two specific questions in the renewal application dealing with adverse determinations of EEO complaints and complaints against the stations (one in the Form 303-S and one in the Form 396). The NAACP's request, however, seeks documents relating to all kinds of matters that are not required to be reported to the FCC.

23. The NAACP's Motion to Compel Production of Documents, filed April 7, 1994 is telling as to its motives in propounding the document requests at issue. According to the NAACP, the reason for Request 12 was that "[d]ocuments exchanged between the employer and employee at the time of separation from a company frequently are the 'smoking guns' which make or break employment discrimination cases." The NAACP claimed that the other requests were also "the kind used in employment discrimination cases." In response, the Church provided further detail concerning its objections to these requests. (See Partial Opposition to Motion to Compel (filed April 14, 1994)).

24. By Memorandum Opinion and Order, FCC 94M-282, released April 21, 1994, the Presiding Judge issued his ruling on the NAACP's Initial Request for Production of Documents. He sustained in part the Church's objections to the Instructions as confusing and burdensome. He properly refused to convert this proceeding into a Title VII case by sustaining the Church's objections